Nos. 14-1468, 14-1470, 14-1507

IN THE

Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

MINNESOTA,

Respondent.

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Writs of Certiorari to the Supreme Courts of Minnesota and North Dakota

BRIEF OF THE NATIONAL COLLEGE FOR DUI DEFENSE AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. STUDIES INDICATE THAT WARRANT PROCEDURES ARE MORE EFFECTIVE IN REDUCING REFUSAL RATES THAN CRIMINALIZING REFUSALS	3
A. Studies By NHTSA Reveal That Criminal Refusal Laws Do Not Affect The Rate Of Refusals	3
B. Criminalizing Refusals Has Had No Impact On Prosecutions Of High Risk Refusers According To Government Studies	5
II. BECAUSE OF THE AVAILABILITY OF ELECTRONIC AND TELEPHONIC WARRANTS, LAWS CRIMINALIZING REFUSALS TO SUBMIT TO WARRANTLESS TESTS IN IMPAIRED DRIVING CASES ARE UNNECESSARY	6
A. States Continue To Successfully Prosecute Thousands Of Drunk Driving Cases After Police Obtain Warrants To Draw Blood	8
B. Technology Advances Allow Police To Obtain Warrants In Minutes	10
1. States Have E-Warrant Procedures	13
2. Telephonic Warrants May Be Granted In Minutes	17

TABLE OF CONTENTS—continued

Page

3. Warrants By Facsimile Are Also Available To Speed The Process 18

III. THREAT OF INCARCERATION IS A RECOGNIZED MEANS OF PSYCHOLOGICAL COERCION AND IS WELL-ESTABLISHED AS A TOOL OF BEHAVIOR MODIFICATION. YET SUCH LEGISLATIVE TECHNIQUES RUN AFOUL OF THE FOURTH AMENDMENT 18

CONCLUSION 22

APPENDICES

APPENDIX A: NHTSA Study 2008, Figure 1. Breath Test Refusal Rates, 2005 ..... 1a

APPENDIX B: NHTSA Study 2008, Figure 2. Breath Test Refusal Rates, 2001 and 2005 ..... 2a

APPENDIX C: NHTSA Study 2011, Figure 1. Breath Test Refusal Rates by State, 2011..... 3a

APPENDIX D: NHTSA Study 2011. Comparison of BAC Test Refusal Rates in 2005 and 2011 ..... 4a

APPENDIX E: Superior Court of California, County of Napa, Search Warrant 5a

APPENDIX F: States That Expressly Allow Electronic or Telephonic Submission and Reception of Warrant Applications and/or Search Warrants..... 11a

APPENDIX G: States That Specify Written or In Person Applications, or Lack Mention of Electronic Submission 13a

TABLE OF CONTENTS—continued

Page

APPENDIX H: States Actively Using Warrants to Draw Blood in DUI Cases 14a

TABLE OF AUTHORITIES

CASES Page

City of Ontario v. *Quon*, 130 S. Ct. 2619 (2010) 12
People v. *Peck*, 38 Cal. App. 3d 993 (Cal. Ct. App. 1974) 11
Schmerber v. *California*, 348 U.S. 757 (1966) 11
State v. *Brown*, 721 P.2d 1357 (Or. 1986) ... 7
State v. *Rodriguez*, 156 P.3d 771 (Utah 2007) 12
United States v. *Baker*, 520 F.Supp. 1080 (S.D. Iowa 1981) 12
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Page

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Page

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Page

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are the National College for DUI Defense ("NCDD") and the National Association of Criminal Defense Lawyers ("NACDL").

NCDD is a nonprofit professional organization of lawyers, with over 2,200 members, focusing on issues related to the defense of persons charged with driving under the influence. Through its educational programs, its website, and its email list, the College trains lawyers to represent persons accused of drunk driving. NCDD's members have extensive experience litigating issues regarding breath blood and urine tests for alcohol and other drugs. NCDD has appeared as amicus curiae in several drunk driving cases before the Supreme Court of the United States.

NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 9,000 direct members in 28 countries - and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys - include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than Amici and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In this brief, Amici make three arguments.

First, available empirical evidence indicates that using warrants is a more effective means of reducing refusal rates than criminal refusal statutes. There is no evidence that criminal refusal laws reduce refusals. Therefore, an opinion by this Court that criminal refusal laws violate the Fourth Amendment would not be likely to cause a reduction in the numbers of people who submit to alcohol or drug testing in future drunk driving prosecutions.

Second, since this Court decided *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), the few jurisdictions where blood had been routinely obtained without a warrant were able to put in place procedures, such as telephonic warrants, to easily obtain warrants when necessary to obtain a test result. Other jurisdictions had processes already in place to take advantage of current technology and obtain warrants easily and efficiently. Warrant procedures are legal, efficient, and effective and should be encouraged.

Third, the threat of incarceration is always coercive. The Fourth Amendment does not permit Congress or a state legislature to legislate coercive means for obtaining "consent" to conduct a search.

For these reasons, this Court should reverse the decisions of the Minnesota and North Dakota Supreme Courts.

ARGUMENT

I. STUDIES INDICATE THAT WARRANT PROCEDURES ARE MORE EFFECTIVE IN REDUCING REFUSAL RATES THAN CRIMINALIZING REFUSALS.

A. Studies By NHTSA Reveal That Criminal Refusal Laws Do Not Affect The Rate Of Refusals.

The National Highway Traffic Safety Administration ("NHTSA") has released studies, including a recent update, examining the effect of refusal statutes on drunk driving enforcement. See A. Berning et al., U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., DOT HS 811 098, *Refusal of Intoxication Testing: A Report to Congress* (2008) (hereinafter "2008 NHTSA Study") and Esther S. Namuswe et al., U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., DOT HS 811 881, *Breath Test Refusal Rates in the United States – 2011 Update* (2014) (hereinafter "2011 NHTSA Study"). The studies looked at the rate of refusal to submit to an alcohol test in DUI cases.

While one obvious purpose of criminal refusal laws is to induce more suspected drunk drivers to consent to an alcohol test, available empirical evidence does not support a conclusion that this desired goal is achieved. The 2008 NHTSA study examined data from 2005. The data showed that in 37 states an overall refusal rate by state ranged from 2% at the low end to 81% at the high end. The 81% refusal rate in New Hampshire, a non-criminal refusal state, appears to be an outlier. The second highest refusal rate of 41% was reported in Massachusetts, another state without a criminal refusal statute. The refusal rate in states with criminal refusal statutes ranged

from 3% to 40%. The 40% refusal rate was reported in Florida, a state with a criminal refusal statute, and with the third highest refusal rate overall. The 2008 NHTSA Study also reviewed and compared figures from 2001.[2] None of these figures indicate a correlation between refusal rates and criminalization of refusal.[3]

The 2011 study reported data from 2011, and compared it to the 2005 data. The studies did not show meaningful changes. Some states reported a rise in refusals, and some states reported a drop. Others reported no change. Florida, a criminal refusal state, recorded the largest change, an *increase* of refusals from 40% to 82%.[4] New Hampshire, a state without a criminal refusal statute, noted a *decrease*, from 81% to 72%.

The 2008 study strongly recommended instituting procedures to allow police to obtain warrants in refusal cases as a "promising" way of obtaining a test result. See 2008 NHTSA Study at 11-15. The Study discussed the warrant experience in Arizona, Utah, Michigan, Oregon, California, and Nevada. It found favorable refusal rates in those jurisdictions and support from law enforcement. As is discussed in the next section of this brief, warrants are easy to obtain, and the implementation of warrant procedures has increased the numbers of test results available in DUI prosecutions.

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[2] *See* 2008 NHTSA Study at 6.

[3] *See* Appendix A, NHTSA Study 2008, Figure 1. Breath Test Refusal Rates, 2005; *see* Appendix B, Figure 2. Breath Test Refusal Rates, 2001 and 2005.

[4] *See* Appendix C, NHTSA Study 2011, Figure 1. Breath Test Refusal Rates by State, 2011; *see* Appendix D, Comparison of BAC Test Refusal Rates in 2005 and 2011.

Put another way, a determination by this Court that the Fourth Amendment prohibits criminalizing refusal to submit to a test, and a reaffirmation from this Court of its holding in *McNeely* of a preference for using warrants, is more likely to improve test gathering than preservation of the status quo in criminal refusal states.[5]

B. Criminalizing Refusals Has Had No Impact On Prosecutions Of High Risk Refusers According To Government Studies.

It is often argued by the government that the criminalization of implied consent laws is a needed and effective tool to combat drunk driving. Such arguments are theoretical and unsupported by real data. Contrary to such an argument, a National Highway Traffic Safety Administration study of all fifty states'

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[5] The 2008 study called for an increase in issuance of warrants to collect blood, and although it noted a higher conviction rate in states that criminalized refusal, because refusers could be convicted of DUI or refusal, it did not call for an increase in criminal refusal laws. The following refusal rates in 2005 in states with criminal refusal statutes were shown:

Alaska (Alaska Stat. § 28.35.032) 16%

Florida (Fla. Stat. 316.1932) 40%

Hawaii (Haw. Rev. Stat. § 291e-68) 11%

Kansas (Kan. Stat. § 8-1025) 27%

Louisiana (R.S. § 661(C)(1)(f)) 39%

Minnesota (Minn. Stat. § 169A.20) 13%

Nebraska (Neb. Rev. Stat. §§ 60-6,211.02 and 60-6,197) 8%

North Dakota (N.D.C.C. § 39-08-01(1)(e)) 14%

Vermont (23V.S.A. § 1201(b)) 17%

Virginia (Va. Code § 18.2-268.3) 3%

implied consent laws (where at the time 12 states had criminal sanctions for refusals) suggested that the criminalization of implied consent laws had very little impact overall:

> There is evidence that license suspension alone will not prevent refusal for many "hard core" refusers with a past history of DWI, test refusal, and other serious traffic offenses. Strong criminal sanctions (including jail terms) for refusal may help deter these individuals. However, we doubt that such sanctions alone will prevent many of this group of high-risk refusers from future refusals, and suspect that a large percentage will require treatment for other dysfunctional behaviors (including alcoholism) that are no doubt related to DWI and implied consent violations.[6]

This study found that many other factors (other than criminalization) had a greater effect on reducing the number of refusals, such as increasing the length of the license suspension and informing the public of the license sanctions for refusal.

II. BECAUSE OF THE AVAILABILITY OF ELECTRONIC AND TELEPHONIC WARRANTS, LAWS CRIMINALIZING REFUSALS TO SUBMIT TO WARRANTLESS TESTS IN IMPAIRED DRIVING CASES ARE UNNECESSARY.

Law enforcement argues that they have a compelling need to obtain samples of a driver's breath, blood, or urine for testing in order to successfully

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[6] *See* Ralph K. Jones et al., U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., DOT HS 807 765, *Implied Consent Refusal Impact* (1991).

prosecute impaired driving cases. But the present-day electronic and telephonic warrant process provides law enforcement with a swift and efficient method to obtain such evidence without doing harm to the Fourth Amendment.

"In this modern day of electronics and computers, we foresee a time in the near future when the warrant requirement . . . can be fulfilled virtually without exception." So said the Oregon Supreme Court nearly thirty years ago.[7] There is little doubt that mobile devices are pervasive in American culture. According to a recent study conducted by the Pew Research Center, as of January 2014, 90 percent of American adults owned cell phones, and as of October 2014. 64 percent owned smart phones, and a little less than half of those surveyed owned tablets.[8]

As some scholars have noted, the advent of modern telecommunication technology provides courts with the opportunity to narrow the use of the exigent circumstances exception as a justification for warrantless searches.[9]

Modern means of communication help facilitate seamless contact between law enforcement officials requesting search warrants in the field and judges

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[7] *State* v. *Brown*, 721 P.2d 1357, 1363 n.6 (Or. 1986)

[8] *See* Pew Research Center, *Mobile Technology Fact Sheet*, http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet (last visited Jan. 25, 2016).

[9] *See* Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 Denv. U. L. Rev. 293, 294–96 (1996); *see* Justin H. Smith, *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 Vand. L. Rev. 1591, 1595-96 (2002).

reviewing the warrant applications. This modern technology serves to dramatically reduce the time needed for a judge to review an application and issue a warrant upon probable cause.[10]

Even if the need to obtain breath samples or blood samples is so great that the failure to get a sample reduces the conviction rate in impaired driving cases, that is not a legitimate reason to legislatively circumvent the warrant requirement: the answer is to modernize the warrant process and promote its efficiency. As the Eighth Circuit stated in *United States* v. *Bozada*: "If the processes of our government are such that police officers are unable to secure search warrants . . . then the cure for that problem is not to sacrifice the Fourth Amendment rights of our citizens, but to streamline the warrant procuring procedure."[11]

A. States Continue To Successfully Prosecute Thousands Of Drunk Driving Cases After Police Obtain Warrants To Draw Blood.

As was noted in *Amici* Br. National College for DUI Defense et al. at 4, *Missouri* v. *McNeely*, No. 11-1425 (S. Ct. Dec. 17, 2012) "[s]tates have had little difficulty enforcing their laws even when the police have been forced to obtain search warrants before withdrawing blood for alcohol testing." As the McNeely amicus brief demonstrated, states had obtained thousands of convictions by following a warrant process to collect blood. *Id.*

NHTSA studies demonstrated successful use of warrants in Arizona, Michigan, Oregon, and Utah.

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[10] *See* Smith, *supra*, at 1625.

[11] 473 F.2d 389, 394–95 (8th Cir. 1973), *quoted in* Smith, *supra* note 9, at 1625–26.

Id.; NHTSA, Use of Warrants for Breath Test Refusal: Case Studies, DOT HS 810 852 (Oct. 2007), at 36 ("NHTSA Case Studies"). "Judges and prosecutors strongly supported warrants for blood draws because there are now more cases with BAC evidence, which has resulted in 'more guilty pleas, fewer trials, and more convictions.'" *Amici* Br. at 4, *McNeely*, No. 11-1425, *quoting* NHTSA Case Studies.

> Blood samples are obtained in a straightforward way. First, a police officer arrests the driver and asks for a breath sample. NHTSA Case Studies at 36. The officer informs the driver of the state's implied consent laws and penalties. *Id.* If the driver refuses to provide a breath sample, the officer requests a warrant for a blood sample by completing the standardized affidavit and warrant forms. *Id.* The officer then either electronically transfers the forms to the judge, magistrate, or prosecutor (or even reads them over the phone) and the warrant is then sworn over the telephone. *Id.; see also* Appendix B (forms used in Phoenix, Arizona). Once the warrant is granted, the driver must submit to the blood draw.

Id. at 5.

The entire process did not take more than two hours. "Police officers interviewed by NHTSA 'generally supported the use of warrants' and were 'willing to take the additional time . . . in order to obtain BAC evidence.'" *Id.* at 6 *quoting*, NHTSA Case Studies.

Since *McNeely* was decided, in the few jurisdictions where warrantless blood draws were the norm in refusal cases, law enforcement and the courts have been able to adapt easily to this Court's decision in *McNeely*.

The southern portion of the Baltimore-Washington Parkway in Maryland, for example, is patrolled by the United States Park Police. Cases are heard before Magistrates in the Southern Division of the United States District Court in Greenbelt, Maryland. Immediately after *McNeely* was decided, Magistrates instituted a telephonic warrant procedure in refusal cases. Officers place a telephone call to the Magistrate on duty. They relay the probable cause for a test and if the judge issues the telephonic warrant, the officer takes the suspect to Prince George's Hospital for a blood draw. The entire process is recorded and takes only a few minutes. As a result, there is a test in virtually every DUI case.

In California, a process was instituted where police fill out a written affidavit and obtain telephonic warrants easily and efficiently. See Appendix E – California warrant.

In short, any argument that requiring police to obtain a search warrant is too burdensome is not supported by the evidence. There are no statistics that show that states without criminal refusal laws are suffering as a result of their compliance with the search warrant process.[12]

B. Technological Advances Allow Police To Obtain Warrants In Minutes.

Advancements in communications technology have substantially expedited the process for obtaining search warrants, making it much easier to get a warrant within the relevant window of time. Using widespread electronic communications technology, police can obtain search warrants in minutes rather than

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[12] *See*, generally, Appendix H, States Actively Using Warrants to Draw Blood in DUI Cases.

hours. There is no practical obstacle to obtaining warrants, such that the police need to criminalize refusals.

In 1966, when the Court decided *Schmerber* v. *California*, 384 U.S. 757 (1966), no state statute allowed for the issuance of warrants via telephone or other electronic means.[13] Police officers seeking warrants had to personally appear before a judge. But today, forty-two states have passed statutes that allow police officers to telephonically or electronically submit warrant applications and for judges to issue search warrants by one or more of the following methods: telephone, radio, facsimile, email, video conference, or text message. See Appendix F (listing statutes). Only a handful of state statutes still specify written or in person applications. See Appendix G (listing statutes). Moreover, even within states that have not expressly provided for electronic warrant procedures, police officers in some jurisdictions have nonetheless found ways to creatively utilize technology to expedite the process.[14]

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[13] California adopted the first statute providing for oral submission of testimony in 1970, four years after this Court's holding in *Schmerber*. *See* Smith, *supra* at 1607; *People* v. *Peck*, 38 Cal. App. 3d 993, 998 (Cal. Ct. App. 1974) (The statute stated that "[i]n lieu of the written affidavit . the magistrate may take an oral statement under oath which shall be recorded and transcribed.").

[14] Even though Fla. Stat. Ann. § 933.07, does not address the use of technology to obtain a warrant, police officers in Palm Bay, have expedited the warrant process by emailing an affidavit to the judge and then videoconferencing with the judge via Skype. Palm Bay Florida Police, *Innovative Policing Creating a Safer Community* (2011), 10, http://www.palmbayflorida.org/home/showdocument?id=5136 "The process takes an average of *less than thirty minutes* in comparison to several hours it

This Court once stated that it is unwise to "elaborat[e] too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."[15] However that time has now arrived insofar as the search warrant process is concerned: emerging technology now makes the application procedure as seamless and swift as it has ever been, reducing the process from hours to minutes.

For example, a recent Utah case held that the availability of telephonic and electronic search warrants was a factor to consider when determining whether a warrantless blood draw was reasonable under the totality of the circumstances. The court upheld the search, but only after noting: "We are confident that were law enforcement officials to take advantage of available technology to apply for warrants, the significance of delay in the exigency analysis would markedly diminish."[16]

Federal courts have been considering the availability of telephonic warrants in an exigency analysis since at least 1981.[17]

Law review commentators also have observed that, with the state of electronics and telecommunications as it now exists, the exigency exception to the search warrant requirement may no longer be viable in its

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would have taken using traditional means." *Id.* (emphasis added).

[15] *City of Ontario* v. *Quon*, 130 S. Ct. 2619, 2629 (2010).

[16] *State* v. *Rodriguez*, 156 P.3d 771 (Utah 2007).

[17] *United States* v. *McEachin*, 670 F.2d 1139, 1146 (D.C. Cir. 1981). See also *United States* v. *Ford*, 56 F.3d 265, 272 (D.C. Cir. 1995); *United States* v. *Patino*, 830 F.2d 1413, 1416-17 (7th Cir. 1987); *United States* v. *Baker*, 520 F.Supp. 1080, 1083-85 (S.D. Iowa 1981).

current form.[18] Any argument that suggests that a criminal refusal statute is necessary because a search warrant is too onerous and time-consuming to follow, disregards the obvious technologies that are available to even the smallest court systems in the country.

1. States Have E-Warrant Procedures.

Forty-two states allow for a warrant to be issued based upon sworn oral testimony. See Appendix F At least nineteen —Alaska, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, New Jersey, New Mexico, Tennessee, Utah, Vermont and Washington —explicitly allow police officers to use "electronic means," "appropriate means" or "other reliable means" to apply for and receive a warrant.

Since California adopted the use of e-signature technology for search warrants, the warrant process even in a remote county of California (Butte) has been cut by hours. [19] There the entire process, from the original application to the judge's review, can be done electronically. Judges are given iPads for after-

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[18] Andrew H. Bean, *Swearing by New Technology: Strengthening the Fourth Amendment by Utilizing Modern Warrant Technology While Satisfying the Oath or Affirmation Clause*, 2014 BYU L. Rev. 927 (2015), http://digitalcommons.law.byu.edu/lawreview/vol2014/iss4/5 ("This Comment submits that modern telecommunications technology has arrived at the point where the communication between a judge and a field officer to obtain a warrant is so seamless and requires so little time that the exigent circumstances exception should be virtually eliminated."); *see also* Beci, *supra*, at 294-96.

[19] Sarah Rich, *Search Warrants With E-Signatures Come to California*, Government Technology, http://www.govtech.com/public-safety/Search-Warrants-With-E-Signatures-Come-to-California.html (Apr. 6, 2012).

hours use. The county selected DocuSign for the digital signature capability. The same news article reported that "[g]overnment entities such as the city of Seattle, the Wisconsin Department of Children and Families, and the Regional Transportation Commission of Southern Nevada had alread implemented" the DocuSign system. *Id.* According to the DocuSign company, "officers [do not even] need to install or learn additional software," and "[a]fter an officer sends in the search warrant authorization request, the officer can enter a judge's contact information, which then is immediately sent to the judge for the digital signature – a process that can take only minutes to complete." *Id.*

A report on a program entitled "Electronic On-Call Warrants - San Bernardino Superior Court" stated that it uses electronic processing of all warrant types during non-court hours and all probable cause declarations. [20] Judicial review is provided by a standard browser application that can run on an iPad, or other mobile device. Judges can be notified of a warrant for processing by telephone, text message, or e-mail. According to the Court's own report:

> The response from judges and law enforcement has been very positive. Law enforcement has been very glad not to have to call a judge in the middle of the night (the system makes the initial contact). Judges have been very appreciative that this is up and running.

Id. In Utah, "[a]ll communication between the magistrate and the peace officer or prosecuting attorney requesting the warrant may be remotely transmitted by

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[20] *Electronic On-Call Warrants San Bernardino Superior Court*, California Courts: The Judicial Branch of California, http://www.courts.ca.gov/27655.htm (last visited Jan. 25, 2016).

voice, image, text, or any combination of those, or by other means."[21] Utah has implemented an e-warrants system:

> The e-warrants system allows Utah law enforcement officers to enter search warrant affidavit information. The system then electronically notifies a prosecutor and forwards the affidavit for review. After review, an officer can transfer the affidavit to a magistrate, electronically notifying him or her of the waiting request. The magistrate can then electronically review the affidavit and generated warrant, electronically sign the warrant, or deny the request with comments, then electronically send the results back to the officer.[22]

Utah's e-warrants system has reduced the amount of time it takes to obtain a warrant from several hours to several minutes. Jason Bergreen, *Utah Cops Praise Electronic Warrant System*, Salt Lake Trib., Dec. 26, 2008 (explaining that it took five minutes to obtain an "e-warrant for a forced blood draw on a man arrested for DUI").

A study of the e-warrant system in Kentucky noted that Kentucky criminal justice practitioners experienced a variety of benefits from the e-Warrants application, including that it "only takes minutes to pro-

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[21] Utah R. Crim. P 40(l)(1)

[22] State of Utah, *e-Warrants: Cross Boundary Collaboration* 1 (2008) http://www.nascio.org/portals/0/awards/nominations2008/2008/2008UT2-e-Warrants%20Submission%206.2.08fs1fs.pdf (last visited Feb. 9, 2016).

cess a warrant and only requires an Internet connection and logon credentials to do so."[23]

Similarly, police officers in Douglas County, Kansas, are able to obtain search warrants in fifteen minutes by emailing a request for a warrant to a judge's iPad, which the judge may sign and return via email. [24]

In Jackson, Michigan electronic warrants have replaced fax machines. According to a news story, "police can create and submit the documents while at the scene of a homicide or alleged drug stash or while trying to collect a blood sample from a suspected drunken driver, and judges can respond from anywhere."[25]

The use of such electronic warrant processes has been lauded in newspaper editorials. Recently, The Republic news in Indiana did just that in referencing drunk driving cases:

> Local police no longer need to request search warrants in person in front of a judge. Now they can send requests and receive signed search warrants with a few keystrokes, rather than a lot of driving and waiting time.

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[23] Michael Jacobson, *Kentucky e-Warrants case Study*, Warrant and Disposition Management Project, http://www.wdmtoolkit.org/~/media/Microsites/Files/Warrants and Dispositions/State Implementations/Kentucky/Kentucky eWarrant Case Study.ashx (Oct. 2012).

[24] Gregory T. Benefiel, *DUI Search Warrants: Prosecuting DUI Refusals*, The Kansas Prosecutor, 18-19 (Spring 2012) http://www.kcdaa.org/Resources/Documents/KSProsecutor-Spring12.pdf (last visited Feb. 9, 2016).

[25] Danielle Salisbury, *As part of larger effort to go paperless, judges now can electronically approve search warrants*, Mlive.com, http://www.mlive.com/news/jackson/index.ssf/2013/07/as_part_of_larger_effort_to_go.html (July 19, 2013).

> Police can make the requests using their in-car computers, and judges and magistrates can electronically sign the warrant and return it via a secure communication link.
>
> Expediency is crucial when time is of the essence, such as when state law dictates that a blood draw for a person who refuses a breath test must be conducted in a certain amount of time.[26]

The Editorial concluded:

> Considering that this technology helps police do their job faster and more efficiently, the decision should be a no-brainer. *Id.*

2. Telephonic Warrants May Be Granted In Minutes.

The vast majority of the forty-two states that allow remote warrants specifically allow the submission of testimony and issuance of warrants over the telephone.[27] Telephonic warrants are more widespread than email or videoconferencing, and they are equally prompt. According to the Chief of Police in Cheyenne, Wyoming, obtaining a search warrant over the phone usually takes less than five minutes.[28] In Billings,

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[26] The Republic, Editorial: *County wise for using electronic warrants*, http://www.therepublic.com/view/local_story/Editorial-County-wise-for-usin_1435881618 (last visited Jan. 25, 2016).

[27] These states include Alabama, Alaska, Arkansas, Arizona, California, Idaho, Indiana, Louisiana, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, South Dakota. Utah, Washington, Wyoming and Wisconsin.

[28] Lindsey Erin Kroskob, *Police Take First Forced Blood Draw*, Wyoming Tribune Eagle, http://www.wyomingnews.com/news/article_2a6c7748-c565-55b5-89ae-bb411b5d80af.html (Aug. 19, 2011).

Montana, it takes about fifteen minutes to obtain a warrant.[29]

3. Warrants by Facsimile Are Also Available To Speed The Process.

Even warrant procedures utilizing older technology, such as facsimile, can be rapidly processed.[30] In San Diego, 95 percent of the telephonic search warrants issued in 1973 were processed in less than 45 minutes.[31]

III. THREAT OF INCARCERATION IS A RECOGNIZED MEANS OF PSYCHOLOGICAL COERCION AND IS WELL-ESTABLISHED AS A TOOL OF BEHAVIOR MODIFICATION. YET SUCH LEGISLATIVE TECHNIQUES RUN AFOUL OF THE FOURTH AMENDMENT.

The obvious purpose of these criminal refusal statutes is to gain consent; compelled and involuntary consent. The threat of arrest and incarceration is a well-recognized behavior modification technique that is deliberately meant to be coercive. The use of the threat of punishment as a means of causing a person

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[29] *Gazette Opinion: Evidence shows value of DUI search warrants*, Billings Gazette, http://billingsgazette.com/news/opinion/editorial/gazette-opinion/gazette-opinion-evidence-shows-value-of-dui-search-warrants/article_f0d1513d-beb1-54b2-a903-b22ca26d2d7c.html (May 30, 2012).

[30] John Henry Hingson, III, *Telephonic and Electronic Search Warrants: A Fine Tonic for an Ailing Fourth Amendment*, The Champion, Sept./Oct. 2005, at 38.

[31] Michael John James Kuzmich, *www.warrant.com: Arrest and Search Warrants by E-mail*, 30 McGeorge L. Rev. 590, 591 (1999).

to perform or refrain from performing a certain act dates back to ancient philosophers. As stated in 1966:

> General prevention has played a substantial part in the *philosophy of the criminal law.* It is mentioned in Greek philosophy, and it is basic in the writings of Beccaria, Bentham and Feuerbach. According to Feuerbach, for example, the function of punishment is to create a "psychological coercion" among the citizens. [Feuerbach, *Lehrbuch Des Gemeinen In Deutschland Peinlichen Rechts* 117 (1812)] The threat of penalty, consequently, had to be specified so that, in the mind of the potential malefactor, the fear of punishment carried more weight than did the sacrifice involved in refraining from the offense. The use of punishment in individual cases could be justified only because punishment was necessary to render the threat effective.
>
> * * *
>
> Notions of general prevention also have played a major part in *legislative actions.* This was especially apparent a hundred or a hundred and fifty years ago when the classical school was dominant. The Bavarian Penal Code of 1813, copied by many countries, was authored by Feuerbach and fashioned on his ideas.
>
> * * *
>
> Unlike mental health acts, penal laws are not designed as prescriptions for people who are in need of treatment because of personality troubles. While there are some exceptions, such as sexual psychopath acts and provisions in penal laws about specific measures to be used when dealing with mentally abnormal people or other special groups of delinquents, penal laws are

> primarily fashioned to *establish and defend social norms.* As a legislature tries to decide whether to extend or to restrict the area of punishable offenses, or to increase or mitigate the penalty, the focus of attention usually is on the ability of penal laws to modify patterns of behavior."[32]

So coercive is the threat of incarceration that it is recognized as a defense to the validity of a contract.[33] "The law is well settled that threats of arrest or imprisonment may constitute such duress as will render a contract entered into, or an act performed under the influence of such threat, voidable at the election of the person threatened. It is immaterial whether such person was guilty or innocent of the act for which arrest or imprisonment was threatened in order for there to be duress."[34]

Threats of incarceration and duress are not new tools in the arsenal of those who seek to induce cooperation. As stated in *Corpus Juris Secundum on Mortgages*: "Broadly stated, the threat of arrest or criminal prosecution used to obtain a mortgage, if it produces fear sufficient to overcome the will of the mortgagor, constitutes duress invalidating the instrument."[35]

* * *

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[32] Johannes Andenaes, *The General Preventive Effects Of Punishment*, 114 U. Pa. L. Rev. 949, 951 -953 (1966) (footnotes included in text or omitted).

[33] *See, e.g.*, Samuel Williston, *A Treatise on the Law of Contracts* § 71:36 (Richard A. Lord, 4th ed. 2003).

[34] *Willig* v. *Rapaport*, 81 A.D.2d 862, 864 (N.Y.A.D. 1981); *see also* 17 N.Y. Jur. Duress and Undue Influence, §§ 18, 19, 21.

[35] 59 C.J.S. Mortgages § 184 (2009) (footnote omitted).

In the present day, however, governments have attempted to replace the warrant process with a system in which the exercise of a constitutional right has become a crime. Any consent that carries penal consequences is no actual consent at all. Left to its own devices, law enforcement would make all refusals to search a type of crime. The claim that such laws are necessary and that the warrant system cannot be utilized, is unsupported by evidence. Rather, to the contrary, available data shows that criminal refusal statutes are an ineffective means of reducing refusals.

If a jurisdiction's outmoded warrant procedures result in habitual delays, then the response should be to update the procedures, rather than to dispense with the protections of the Fourth Amendment by criminalizing the constitutional right of a citizen to demand that a warrant be procured before authorities consents to a search of his body for any evidence of the crime of which he is accused.

CONCLUSION

For the foregoing reasons, this Court should reverse the decisions of the Supreme Courts of the States of Minnesota and North Dakota.

Respectfully submitted,

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Counsel for Amici Curiae

February 11, 2016

* Counsel of Record

APPENDIX

Figure 1. Breath Test Refusal Rates, 2005

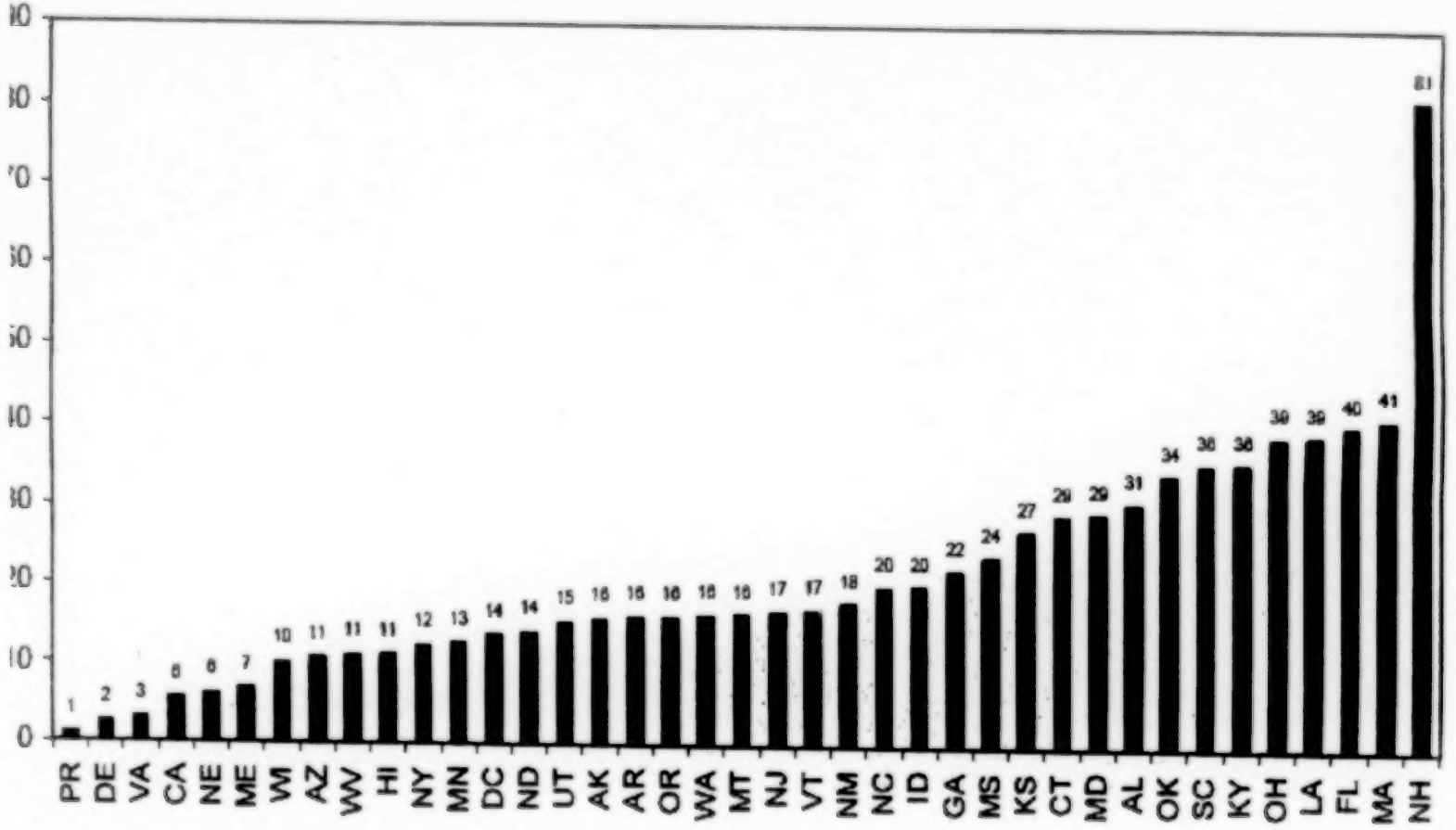


Figure 2. Breath Test Refusal Rates, 2001 and 2005

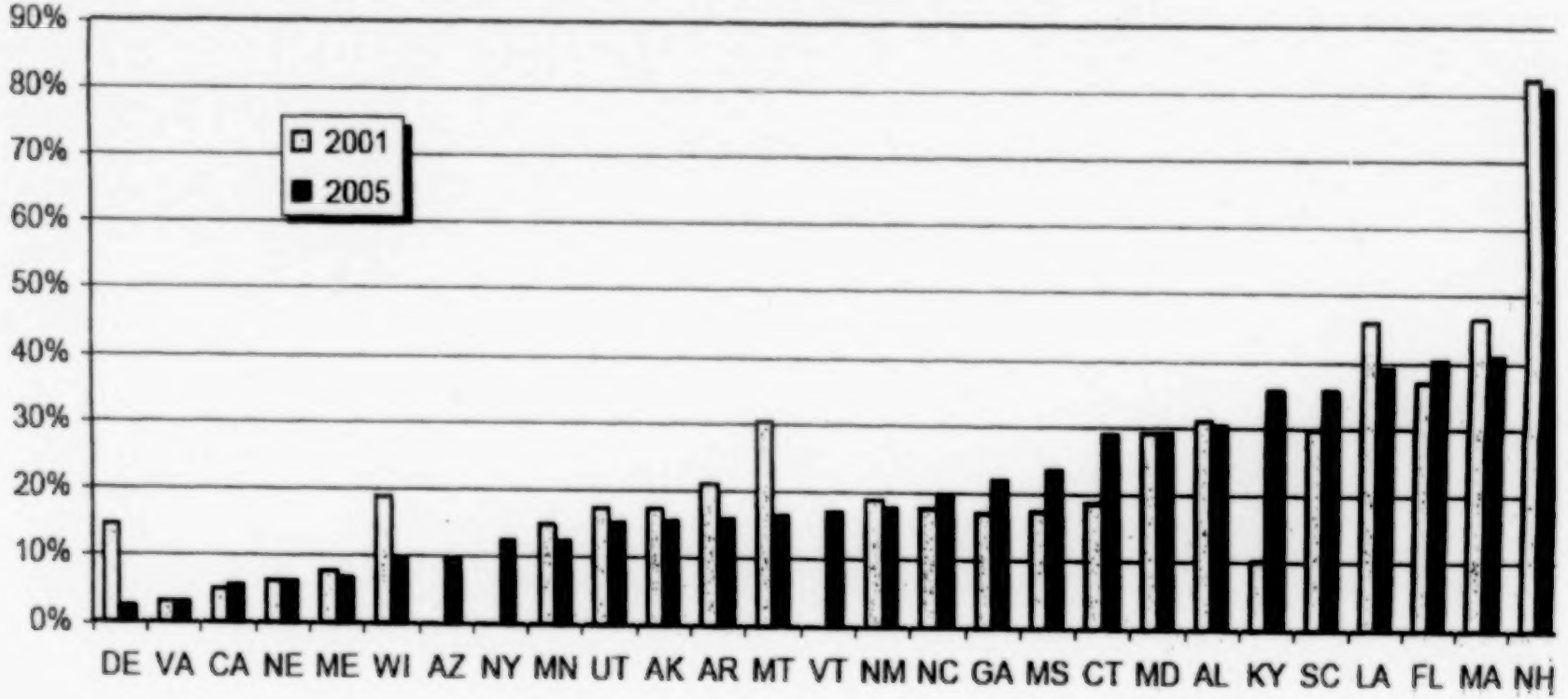
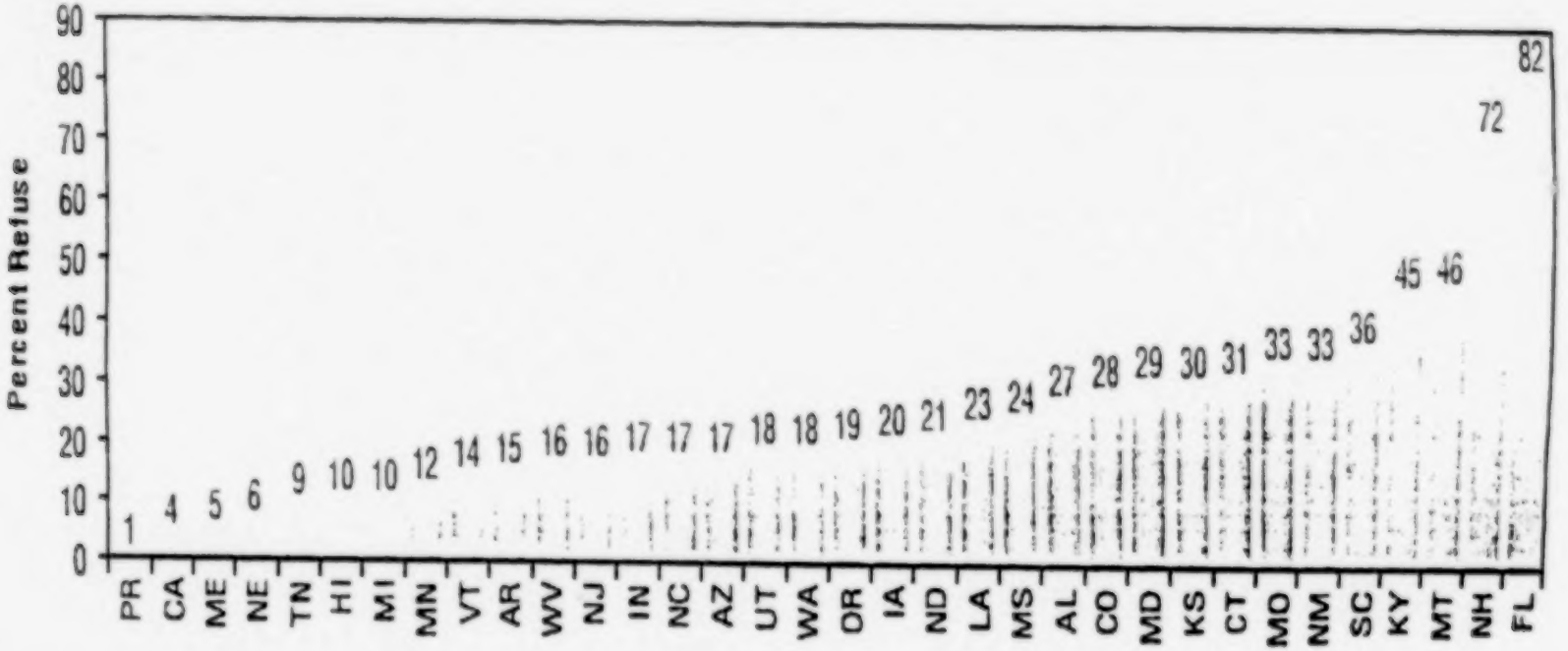
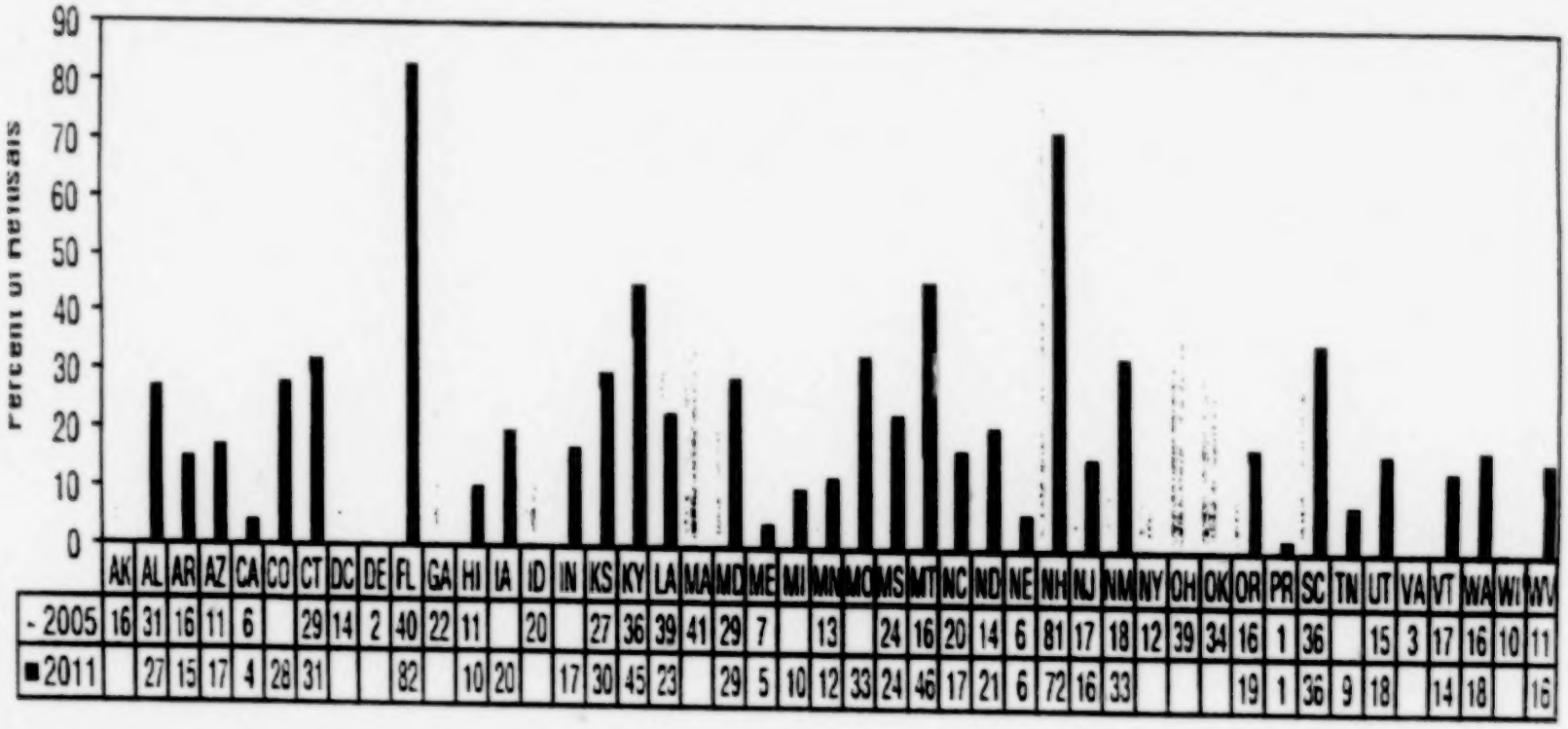


Figure 1
Breath Test Refusal Rates by State, 2011



Note that New Hampshire had 2011 data only from January to September. Therefore, the data are extrapolated based on the average for the 9-month period.

ıparison of BAC Test Refusal Rates in 2005 and 2011



	AK	AL	AR	AZ	CA	CO	CT	DC	DE	FL	GA	HI	IA	ID	IN	KS	KY	LA	MA	MD	ME	MI	MN	MO	MS	MT	NC	ND	NE	NH	NJ	NM	NY	OH	OK	OR	PR	SC	TN	UT	VA	VT	WA	WI	WV
- 2005	16	31	16	11	6		29	14	2	40	22	11		20		27	36	39	41	29	7		13		24	16	20	14	6	81	17	18	12	39	34	16	1	36		15	3	17	16	10	11
■2011		27	15	17	4	28	31			82		10	20		17	30	45	23		29	5	10	12	33	24	46	17	21	6	72	16	33				19	1	36	9	18		14	18		16

'aph includes data from all States that provided data in 2005 and/or 2011.

APPENDIX E

SUPERIOR COURT OF CALIFORNIA
County of Napa

SEARCH WARRANT
Blood Draw
(Veh. Code §§ 23140, 23152, 23153)

Warrant No. SW15-297

The People of the State of California

To Any Peace Officer in Napa County

Name of arrestee: [redacted]

Name of affiant: M. Wilson

Vehicle Code violation: ☒ 23152 ☐ 23153 ☐ 23140

Proof, by affidavit, having been made before me this day by M. Wilson, that there is probable cause for believing that items lawfully seizable pursuant to California Penal Code §1524 in that:

X a sample of the blood of a person constitutes evidence that tends to show a violation of Section 23140, 23152, or 23153 of the Vehicle Code and the person from whom the sample is being sought has refused an officer's request to submit to, or has failed to complete, a blood test as required by Section 23612 of the Vehicle Code, and the sample will be drawn from the person in a reasonable, medically approved manner.

___ the property or things to be seized constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

The affidavit below, which was sworn to and subscribed before me on this date, has established the following:

(1) At the date and time listed in the affidavit, the arrestee was arrested for driving a vehicle in Napa County in violation of Vehicle Code § 23152, and the arrestee remains in custody for this offense.

(2) There was probable cause for the arrest.

(3) There is probable cause to believe that the testing of a sample of arrestee's blood will produce reliable evidence as to arrestee's guilt or innocence.

Pursuant to *Missouri v. McNeely* (2013) __ U.S. __ (133 S. Ct. 1552), and California Penal Code §1524, you are therefore ordered to promptly obtain a sample of the arrestee's blood and submit the sample to an approved laboratory for analysis. The sample shall be obtained in a medically approved manner by personnel who are certified to draw blood. If the arrestee physically resists the execution of this warrant after being notified by an officer that this warrant has been issued, officers may utilize reasonable force to execute this warrant.

Approved by telephone on 10/22/15 at
0210 by Judge Diane Price

DP
Nighttime Service Authorized
(2200-0700) if initialed or signed

10/22/15
Date

DIANE PRICE
Judge of the Superior Court

Confirmed Diane M. Price
10/23/15 1:05pm

AFFIDAVIT

Name of affiant: M. Wilson
Anima's agency: CHP
Name of arrestee: [redacted]
Date of arrest: 10-22-15
Time of arrest: 0028 HRS

I am a law enforcement officer employed by the above agency. On the above date and time I arrested the arrestee for violating Vehicle Code § 23152 and the arrestee has remained in custody. The arrest was based on the following circumstances that were witnessed by me or, where indicated, were witnessed by another officer who informed me of the circumstance:

On 10/22/15 at approx. 0010 hrs my partner, SGT. Duncan, #15139, (driver) and I were traveling on southbound SR-29 n/o First St when my attention was drawn to the subject vehicle (s/v) silver 4 door traveling at a high rate of speed. We were in a fully marked black and white patrol vehicle. I activated the patrol vehicle's front radar and obtained a speed of 74 mph in a posted 60 mph. We positioned the patrol vehicle behind the s/v and initiated an enforcement stop using the patrol vehicles overhead red lights. The s/v yielded at Imola Ave. and e/o Golden Gate Dr. I contacted the driver through the open driver side window. I could smell the odor of an alcoholic beverage coming from the vehicle. He was I.D. by his Oklahoma D.L. and instructed to exit the vehicle, where I could still smell an alcoholic beverage coming from his breath and person. He was give the pre FST question and was unable to perform the FST's as explained and demonstrated and placed under arrest.

Declaration: I declare under penalty of perjury that the foregoing is true.

10/22/15	M. Wilson
Date	Affiant

[redacted] Refusal Warrant Transcription

Judge Price- "I am Napa Superior Court Judge Diane Price. Officer please state your name for the record."

Officer Wilson- "Officer Myron Wilson."

Judge Price- "Alright, Officer Wilson you have emailed to me a search warrant and an affidavit, I see that, um, you have already sign the affidavit but please raise your right hand. Do you swear under penalty of perjury that everything in the affidavit is true and correct?"

Officer Wilson- "Yes I do."

Judge Price- "Ok, and is that your signature on the affidavit?'

Officer Wilson- "Yes Ma'am."

Judge Price- "And, uh. Having read the search warrant and statement of probable cause prepared by Officer Wilson, I find there is probable cause to issue the warrant. And given the present hour I find that there is good cause and I authorize nighttime service of this warrant. Officer you have my permission to affix my signature to this warrant and write on the warrant Approved by telephone on October 22 at 2:10 am by Judge Diane M. Price.

SEARCH WARRANT RETURN
SEARCH WARRANT #SW15-297

SAMPLE OF **WHOLE BLOOD WAS** SEIZED FROM SUBJECT: [redacted]

In the County of Napa, State of California by virtue of a search warrant dated the ____ day of October 22, 2015, and executed by Judge DIANE PRICE, Napa Superior Court County of Napa, State of California:

I, MARC RENSPURGER, the officer by whom this Warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the Warrant.

All of the property taken by virtue of said Warrant will be submitted to the evidence locker at the Napa area CHP office for subsequent forensic testing by California Department of Justice (DOJ), subject to the order of this Court or of any Court in which the offense in respect to which the property or things taken is triable.

/s/ Marc Renspurger
Officer

Subscribed and sworn to before me this 23 day of October 2015

/s/ Diane M. Price
JUDGE OF THE ABOVE ENTITLED COURT

COUNTY OF NAPA

Notice Re: Property Seized Pursuant to Search Warrant

Date Issued: 10/22/15 Date Served: 10/22/15

Warrant No.: _____

Judge DIANE PRICE of the Napa Consolidated Courts, 825 Brown St, Napa, Ca.

YOU ARE HEREBY PUT ON NOTICE THAT the property listed below was seized under the authority a Search Warrant and is now under the jurisdiction of the issuing court. You may seek the return of this property by filing a Motion for Return of Property pursuant to California Penal Code sections 1536 / 1540 with the Clerk of the Consolidated Courts. However, the filing of a Motion for Return of Property will not necessarily result in the property's return. You may wish to consult with an attorney regarding the filing of the motion. You may have other legal remedies. The service of this Notice does not obligate the seizing law enforcement agency to return the property nor is it a relinquishment of any holds that maybe placed by other government agencies.

Item	Description	Item	Description
1	VIAL BLOOD		

Inquires regarding this property should be made to
(Agency Name) CHP

(Peace Officers Name) M. Wilson
(Address) 975 Golden Gate Dr Napa
(Telephone No.) 707-253-4906
(Case No.) CB28284

Notice was given to/left at [redacted]
(Ofc. Initials) Illegible

APPENDIX F

States That Expressly Allow Electronic or Telephonic Submission and Reception of Warrant Applications and/or Search Warrants

Ala. R. Crim. P. 3.8(b)

Alaska Stat. Ann. § 12.35.015

Ariz. Rev. Stat. Ann. §§ 13-3914(C), 13-3915(D), (E)

Ark. Code Ann. § 16-82-201

Cal. Penal Code § 1526(b)

Colo. Rev. Stat. Ann. § 16-1-106(3)(b)

Ga. Code Ann. § 17-5-21.1

Haw. R. Penal P. 41

Idaho Code Ann. §§ 19-4404, 19-4406

Ill. - 725 Ill. Comp. Stat. Ann. 5/108-4(a)

Ind. Code. Ann. § 35-33-5-8

Iowa Code Ann. §§ 808.3, 808.4; Iowa Code Ann. § 321J.10(3) (telephonic testimony communicated only in circumstances involving traffic accidents)

Kan. Stat. Ann. §§ 22-2502(a), 22-2504

Ky. Electronic application and issuance (§ 455.170)

La. Code Crim. Proc. Ann. art. 162.1(B), (D)

Md. Rules Of Criminal Procedure 1 203(a)(2)(iii)(2)

Me. R. Crim. P. 41C

Mich. Comp. Laws Ann. § 780.651(2)-(6)

Minn. R. Crim. P. 36.01, 36.05

Mo. Ann. Stat. § 542.276(3), (7)

Mont. Code Ann. §§ 46-5-221, 46-5-222

Nev. Rev. Stat. Ann. § 179.045(2), (4)

N.C. Gen. Stat. Ann. § 15A-245(a)(3)

N.D. R. Crim. P. 41(c)(2)-(3)

N.H. Rev. Stat. Ann. § 595-A:4-a

N.J. R. Crim. P. 3:5-3(b)

N.M. R. Crim. P. 5-211(F)(3), (G)(3)

N.Y. Crim. Proc. Law §§ 690.36(1), 690.40(3), 690.45(1), (2) (McKinney 2012)

Ohio R. Crim. P. 41(C)(1)-(2)

Okla. Stat. Ann. tit. 22 §§ 1223.1, 1225(B)

Or. Rev. Stat. Ann. § 133.545(5)-(6)

Pa. R. Crim. P. 203(A), (C)

S.D. Codified Laws §§ 23A-35-4.2, 23A-35-5, 23A- 35-6

Tenn. Rules of Criminal Procedure, Rule 41(c)(2)

Utah R. Crim. P. 40(l)

Vt. R. Crim. P. 41(c)(4), (g)(2)

Va. Code Ann. § 19.2-54

Wash. Super. Ct. Crim. R. 2.3(c)

Wis. Stat. Ann. § 968.12(3)

Wyo.: W.S. 31-6-102(d)

APPENDIX G

States That Specify Written or In Person Applications, or Lack Mention of Electronic Submission

Conn. Gen. Stat. Ann. § 54-33a(c)

Del. Code. Ann. tit. 11 §§ 2306, 2307

Fla. Stat. Ann. §§ 933.06, 933.07(1)

Mass. Gen. Laws Ann. ch. 276, § 2b

Miss. Code Ann. § 99-15-11

R.I. Gen. Laws Ann. § 12-5-3

S.C. Code Ann. § 17-13-140

Tex. Code Crim. Proc. Ann. art. 18.01

APPENDIX H

States Actively Using Warrants to Draw Blood in DUI Cases

Alabama

Britton v. *State*, 631 So. 2d 1073 (Ala. Crim. App. 1993); A. R. Crim. P. 16.2(b)(6)

Arizona

Ariz. Rev. Stat. Ann. §§ 13-3915 (D), (E), 28-1321, 28-1388

Georgia

Ga. Code Ann. § 40-5-67.1 (d.1); Rhonda Cook, *DUI Test Refusals Prompt Blood Warrant*, Atlanta J. Const. (Dec. 23, 2011), *available at* http://www.ajc.com/news/news/local/dui-test-refusals-prompt-blood-warrants/nQPnJ/ (last visited Dec. 14, 2012)

Illinois

DuPage County Rolls Out 'No Refusal' Weekend Over Labor Day, Naperville Patch (Aug. 31, 2011), *available at* http://naperville.patch.com/articles/dupage-county-rolls-out-no-refusal-weekend-over-labor-day-2 (last visited Dec. 14, 2012)

Iowa

Iowa Code §§ 321J.10, 321J.10A(1)(c); *State* v. *Harris*, 763 N.W.2d 269 (Iowa 2009); *State* v. *Johnson*, 744 N.W.2d 340 (Iowa 2008)

Kansas

Kan. Stat. Ann. § 8-1001 (p), (t); George Diepenbrock, *With iPads, Judges In Touch Any Time, Any Place*, Lawrence J. World (Feb. 5, 2012), *available at* http://www2.ljworld.com/news/2012/feb/

05/ipads-judges-touch-any-time-any-place/ (last visited Dec. 14, 2012); Gregory T. Benefiel, *DUI Search Warrants: Prosecuting DUI Refusals*, The Kansas Prosecutor, Vol. 9, No. 1 (Spring 2012), *available at* http://www.kcdaa.org/Resources/Documents/KSProsecutor-Spring12.pdf

Louisiana

Mike Steele & Heather Harel, *State Police Say "No Refusal" Weekend Has Been Successful*, wbzr.com (Sept. 6, 2010), *available at* http://www.wbrz.com/news/no-refusal-weekend/ (last visited Dec. 14, 2012); Raymond Legendre & Houma Courier, *No Refusal Weekend For Those Suspected Of DWI Has Critics, Supporters*, wwltv.com eyewitness news (Sept. 10, 2010), *available at* http://www.wwltv.com/news/local/No-Refusal-weekend-for-those-suspected-of-DWI-case-critics- supporters-102228604.html (last visited Dec. 14, 2012)

Michigan

Mich. Comp. Laws § 780.651; *State* v. *Snyder*, 449 N.W.2d 703 (Mich. Ct. App. 1989)

Mississippi

McDuff v. *State*, 763 So.2d 850 (Miss. 2000)

Missouri

State v. *McNeely*, 358 S.W.3d 65, 68 (Mo. 2012); Dana Fields, *Mo. Supreme Court Rejects Warrantless DWI Blood Test*, Associated Press, Jan. 18, 2012, *available at* 1/18/12 AP Alert MO (Westlaw)

Montana

Mont. Code Ann. § 61-8-402; Gwen Florio, *Judges Happily Lose Sleep Over Montana's New DUI Blood-draw Law*, The Missoulian (Dec. 18, 2011), *available at* http://missoulian.com/news/local/judges-happily-lose-sleep-over-montana-s-new-dui-blood/article_2bbe48e0-2922-11e1-917d-001871e3ce6c.html (last visited Dec. 14, 2012)

New Mexico

N.M. Stat. Ann. § 66-8-111; *State* v. *Hughey*, 163 P.3d 470 (N.M. 2007); *State* v. *Silago*, 119 P.3d 181 (N.M. Ct. App. 2005); *State* v. *Montoya*, 114 P.3d 393 (N.M. Ct. App. 2005); *State* v. *Duquette*, 994 P.2d 776 (N.M. Ct. App. 1999)

North Carolina

N.C. Gen. Stat. Ann. § 20- 139.1(b5); Nat'l Highway Safety Transp. Admin., *Use of Warrants to Reduce Breath Test Refusals: Experiences From North Carolina*, DOT HS 811461 (Apr. 2011), *available at* www.nhtsa.gov/staticfiles/nti/pdf/811461.pdf

Ohio

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